

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re CALEB R., a Person Coming Under the  
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MELISSA P.,

Defendant and Appellant.

F077416

(Super. Ct. No. 17CEJ300290-2)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Gary Green,  
Commissioner.

Castro Law Group and Mark J. Castro for Defendant and Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County  
Counsel, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Peña, Acting P.J., Smith, J. and DeSantos, J.

Appellant Melissa P., maternal aunt and legal guardian of now 11-year-old Caleb R., appeals the juvenile court's jurisdictional finding adjudging Caleb a dependent child pursuant to Welfare and Institutions Code section 300, subdivision (b)(1).<sup>1</sup> Under subdivision (b)(1) of section 300, it must be proved there is a substantial risk the child will suffer serious physical harm as a result of his guardian's failure to supervise or protect him. Melissa contends the allegations contained in the petition failed to state a basis for jurisdiction under section 300, subdivision (b) and that there was insufficient evidence for the court to assume jurisdiction over Caleb. We conclude Melissa's appeal is moot and dismiss it in light of the juvenile court's order terminating the legal guardianship, which Melissa did not challenge.

### **PROCEDURAL AND FACTUAL SUMMARY**

On September 20, 2017, social worker Yolanda Dinwiddie from the Fresno County Department of Social Services (department) and a sheriff's deputy contacted Melissa at her home regarding a report that then 10-year-old Caleb was being " 'tossed around' " and made to do squats until his legs shook and he could not stand. Caleb is developmentally delayed and then functioned at a cognitive age of six to seven. He reported that Kyla, Melissa's 16-year-old daughter, threw a coat hanger at him. He had two bruises on his right thigh. When Caleb was asked about the bruises, he said Kyla hit him. Caleb measured under four feet in height and weighed 68 pounds. Kyla was five feet six inches tall and weighed 280 pounds.

Melissa denied using corporal punishment on Caleb or allowing Kyla to inflict corporal punishment. However, she allowed Kyla to discipline Caleb by doing jumping jacks or squats or making him stand in the corner if he received a negative report from his

---

<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

teacher. She explained that Caleb's teacher recorded his behavior in a communication book (the book) that she sent home with him each school day. If Kyla was home when he arrived from school at around 3:30 p.m., she checked the book and disciplined him if it was indicated. Kyla was home three school days a week. Melissa did not arrive home from work until 5:30 p.m. Because there were past referrals alleging abuse of Caleb by Melissa, Dinwiddie asked Melissa whether a prior social worker advised her that Caleb could be removed from her care if there were any more allegations of possible physical abuse regarding Caleb. Melissa denied that any social worker had discussed that with her.

During her interview with Melissa, Dinwiddie noticed a large neon sign which stated, " 'I like being mean to my Teacher.' " Melissa said she made the sign and forced Caleb to stand out in front of the house wearing it around his neck. She made him wear it long enough for her to smoke a cigarette.

Dinwiddie interviewed Willow, Caleb's then 14-year-old half sister, who was also under Melissa's guardianship. Willow stated she saw Melissa and Kyla hit and kick Caleb on his buttocks and make him exercise for a long time. She saw Kyla throw Caleb to the ground many times and Melissa pull on his shirt around his neck. She did not get hit when she was in trouble but was grounded. Willow became teary-eyed, dropped her head and did not want to discuss Caleb's physical abuse. She said she was not afraid of Melissa and felt safe.

Dinwiddie noticed Caleb had two linear light purple green bruises on his right upper thigh and a swollen right knee, which Caleb said Kyla caused by hitting him. He also said Kyla slapped him on the chest, picked him up and threw him on the ground and threw hangers at him. Melissa and Kyla spanked him, kicked him in his " 'butt' " and made him do squats, jumping jacks, and pushups against the wall for a long time. Melissa made him stand outside a long time with the sign around his neck.

Caleb told Dinwiddie Kyla grabbed the book as soon as he got home from school. After looking at it she told him, “ ‘You are going to get it today.’ ” He said he was afraid of Kyla and Melissa. He did not feel safe in the family home and did not want to live there.

The deputy placed a protective hold on Caleb but allowed Willow to remain in Melissa’s custody.

Following a meeting on September 22, 2017, the department filed a dependency petition, seeking Caleb’s removal from Melissa’s custody. During the meeting, Melissa denied physically abusing Caleb and said he could have bruised himself jumping off the desks at school. She said when he had a bad day he would go to school and show his teachers his bruises and say she or Kyla hit him. Kyla, who was also at the meeting, stated, “ ‘I have never abused Caleb’ ” when asked if she used corporal punishment to discipline him. Melissa explained that their attorney advised them to give that response.

The petition alleged one count each under section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect) as to Caleb.<sup>2</sup> Under subdivision (a) it alleged that Caleb suffered or there was a substantial risk he would suffer serious physical harm inflicted nonaccidentally by Melissa in that she hit and kicked him on the buttocks using objects such as sticks and/or other objects, pulled on his neckline and made him exercise for extended periods. It further alleged that on or about September 20, 2017, Caleb had two linear bruises on his right thigh from being hit with a stick while in Melissa’s custody and Melissa had no reasonable explanation as to how Caleb sustained the injuries. The petition further alleged under subdivision (b) that Caleb suffered or there was a substantial risk that he would suffer serious physical harm or illness as a result of Melissa’s failure to supervise or protect him in that she knew or reasonably should have

---

<sup>2</sup> The petition also alleged one count under each subdivision as to Willow.

known that Kyla was using inappropriate physical discipline which included making him exercise for extended periods and throwing, choking and hitting him with objects such as hangers. Additionally, it included the allegation regarding the bruising on Caleb's thigh and Melissa's inability to provide a reasonable explanation for the injuries.

On September 27, 2017, Melissa appeared with retained counsel at the detention hearing and denied the allegations. The juvenile court found a prima facie showing that Caleb and Willow were children described under section 300, ordered them removed from Melissa and placed in the care and custody of the department. The court ordered the department to provide Melissa parenting instruction and a domestic violence assessment and mental health evaluations for Melissa and the children. The court also ordered an assessment for Caleb at the Central Valley Regional Center. The court issued a protective custody warrant for Willow and she was removed from Melissa's care and placed in foster care.

On November 1, 2017, the date set for the jurisdictional hearing, the juvenile court found that the whereabouts of the children's mother and fathers were unknown. The court also set a combined jurisdictional/dispositional hearing (combined hearing) for December 13, 2017.

On December 13, 2017, the court ordered a psychological evaluation for Caleb and set a continued combined hearing for January 31, 2018.

On January 31, 2018, at the combined hearing, the department recommended the juvenile court place Willow with Melissa under a plan of family maintenance, terminate her guardianship as to Caleb and order reunification services for Caleb's parents who were located in Arkansas. Caleb's parents appeared at the hearing and indicated they intended to remain in Fresno. The court set a contested jurisdictional hearing at Melissa's request, granted the department discretion to assess Melissa for extended visits with Willow and ordered reunification services for Caleb's parents.

The juvenile court convened the contested jurisdictional hearing on March 21, 2018. Arthur Ullner, Caleb's special education teacher, was called to testify that Caleb often lied. Caleb was in his class about two weeks before Christmas and transferred to another class six weeks before the hearing. He said "90 percent of what Caleb said was fantasy" but the example he gave was more Caleb's perception of events rather than a lie. Ullner never saw any bruises on Caleb.

Melissa testified she had been the children's guardian for a little over four years. Caleb was diagnosed with attention deficit hyperactivity disorder, emotional disturbance, intellectual delay and was being assessed for autism. She denied seeing a bruise on Caleb's leg the day he was removed but he showed her a bruise on his hip earlier that day. He said he did not know how it happened. She did not know how he bruised himself, but he bruised himself a lot and she could only surmise that he kicked a chair or table at school because he is very aggressive in the classroom. She denied hitting, spanking, choking or striking Caleb with a stick. She punished him by taking away his privileges or making him take a nap. She had him exercise not for punishment but to help him expend his extra energy. She might ask him to run one or two laps around the house or do five or 10 jumping jacks or the same number of push-ups. Since he enjoyed running, he was allowed to run as many laps as he wanted. He never appeared or said that he was physically exhausted and was always full of energy.

Melissa testified that she worked from 8:00 a.m. to 4:00 p.m. Caleb arrived home from school between 3:20 and 3:25 p.m. On the days Kyla was home, she called Melissa to tell her what the teacher had written that day in the book. Melissa would then determine what discipline Caleb should receive. Melissa did not authorize Kyla to hit Caleb and never saw Kyla hit, push, slap, throw or kick Caleb in the buttocks. Occasionally, while on the phone with Kyla, Melissa would tell her to send Caleb to his room if he was being destructive or have Kyla put him on speaker phone and Melissa

would ask him to do jumping jacks. Melissa did not believe Kyla could have hurt Caleb while she was alone with him because Kyla considered herself a big sister to him. She acknowledged pulling on his shirt to get his attention but denied using force to do so. She made Caleb stand outside with the sign because he hit his teacher and laughed when she asked him about it. His behavior had escalated from throwing chairs and tables and destroying the classroom to becoming aggressive with his teacher. She did not believe he was embarrassed by having to hold the sign.

The juvenile court asked Melissa why Kyla needed to review the book if Melissa was going to be home within an hour of Caleb arriving home. She explained that it was so that he could receive any rewards he had coming immediately, such as edible treats or extra computer time, or so that Kyla could tell him he could not go outside to play if he received a bad report. She wanted them to know that she was on her way home.

Dinwiddie testified she saw two ligature marks, each approximately three inches long, on Caleb's upper hip which could have been made by a belt or a stick. Kyla and Willow also testified. Kyla denied hitting Caleb or pushing him down. She never saw Melissa hit him. Willow denied telling the social worker that Melissa and Kyla hit Caleb.

On March 26, 2018, the juvenile court sustained the section 300, subdivision (b)(1) count as to Caleb and dismissed the subdivision (a) count. The court did not find Melissa entirely credible and found that she allowed Kyla to administer inappropriate physical discipline towards Caleb. The court found insufficient evidence that Willow was at risk of harm and dismissed the subdivision (a) and (b)(1) counts as to her. The court ordered Willow returned to Melissa's custody and ordered unsupervised visits for Caleb's parents to begin immediately.

On April 9, 2018, following a contested dispositional hearing, the juvenile court terminated Melissa's probate guardianship and set a six-month review hearing as to Caleb's parents for September 2018.

Melissa filed a notice of appeal challenging the juvenile court's March 26, 2018 jurisdictional finding. She contends the petition was facially deficient and should have been dismissed. She further contends there was insufficient evidence to support a jurisdictional finding under section 300, subdivision (b)(1) that Caleb was at a substantial risk of serious physical harm in her custody. Melissa does not, however, challenge the juvenile court's dispositional order terminating her legal guardianship. We invited the parties to file supplemental briefing on whether this appeal was rendered moot by Melissa's failure to appeal the dispositional order. Neither party responded.

### **DISCUSSION**

"A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment." (§ 395, subd. (a)(1).) The notice of appeal must ordinarily "be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.406(a)(1).)

"The dispositional order is the 'judgment' referred to in section 395, and all subsequent orders are appealable. [Citation.] ' "A consequence of section 395 is that an unappealed disposition ... order is final and binding ...." ' " (*In re S.B.* (2009) 46 Cal.4<sup>th</sup> 529, 532.) "[J]urisdictional findings and other orders entered before the dispositional hearing are generally reviewable on appeal from the dispositional order." (*In re M.C.* (2011) 199 Cal.App.4<sup>th</sup> 784, 801.)

It is the function of an appellate court to decide actual controversies by a judgment which can be carried into effect. When no effective relief can be granted, an appeal is moot and will be dismissed. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.) Since Melissa did not challenge the dispositional order, it is now final and binding. Consequently, even if she were to prevail on appeal,



we would not be able to overturn the court's order terminating the legal guardianship. In any event, we would find no error.

A petition brought under section 300 must contain "[a] concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person [described by] each of the sections and subdivisions under which the proceedings are being instituted." (§ 332, subd. (f).)

"The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) The juvenile court may find a substantial risk of serious future injury under section 300, subdivision (b) based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries or a combination of these and other actions by the parent or guardian which indicate the child is at risk. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823, abrogated on another ground in *In re R.T.* (2017) 3 Cal.5th 622.)

Here, the sustained petition alleged Melissa allowed Kyla to impose inappropriate physical discipline on Caleb, which resulted in injury. The discipline included exercise for extended periods of time, throwing and choking him and hitting him with objects. If found true by a preponderance of the evidence, these allegations supported a jurisdictional finding under section 300, subdivision (b)(1) that Caleb suffered or was at a substantial risk of suffering serious physical harm.

Further, evidence admitted and adduced at the hearing supported the juvenile court's jurisdictional finding. Caleb and Willow's statements included in the department's reports described how Melissa and Kyla inappropriately disciplined Caleb. Melissa admitted allowing Kyla to discipline him by making him exercise and Dinwiddie described the bruising she observed on Caleb's leg, which appeared to have been made by a belt or a stick. Although Melissa denied she and Kyla harmed Caleb and Willow

recanted her statement, the juvenile court did not find Melissa credible and questioned the veracity of Willow's recantation. On the evidence before it, the juvenile court could conclude that Kyla's inappropriate discipline of Caleb sanctioned by Melissa would continue and escalate, placing Caleb at a substantial risk of serious harm.

#### **DISPOSITION**

The appeal is dismissed as moot.